Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

(V)

85-2107

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1986

Amoco Oil Co.,
Petitioner,

v

Jim Heiling Oil & Gas, Inc.; Harmer Oil,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MERRILL, TATHAM & ROSATI, P.C.
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28 pp

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred by interpreting the waiver doctrine of Bankers Trust Co. v Mallis to destroy, rather than preserve, the within appeal.

II. Whether the Court of Appeals erred by determining the commencement of the appeal period as the date of improper entry of the Opinion and Order rather than the date of Appellant's act constituting a waiver of the separate document requirment.

III. Whether the Court of Appeals erred by dismissing the appeal from the District Court Opinion and Order affirming the Bankruptcy Courts' Order of Abandonment, for lack of jurisdiction on grounds of untimely filing.

DISCLOSURE OF CORPORATE AFFILIATIONS

Pursuant to Sup. Ct. R. 28.1, Petitioner, Amoco Oil Company, a Maryland corporation, makes the following disclosure:

Petitioner, Amoco Oil Company, is a wholly owned subsidiary of Amoco Corporation, an Indiana corporation, formerly known as Standard Oil Company (Indiana). Amoco Corporation is a publicly owned corporation.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1986

Amoco Oil Co.,
Petitioner,

v

Jim Heiling Oil & Gas, Inc.; Harmer Oil,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner, Amoco Oil Company, respectfully prays that a writ of certiorari issue to review the Opinions and Orders of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 7 and March 25, 1986.

OPINIONS BELOW

The Opinion and Order entered by the United States District Court, Eastern District of Michigan, Southern Division, Flint appears in the record (R 11-14)[1] and is reproduced in Appendix A. The Opinion and Order of the District Court Denying Motion for Reconsideration appears in the record (R 15-17) and is reproduced in Appendix B. The Show Cause Order of the United States Court of Appeals for the Sixth Circuit appears in Appendix C. The Judgment of the United States Court of

[1]All record citations refer to the parties Joint Appendix, filed on appeal with the Sixth Circuit.

Appeals dismissing the appeal for lack of jurisdiction is unreported and appears in Appendix D. The Judgment of the United States Court of Appeals denying the Motion for Reconsideration is unreported and appears in Appendix E.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 25, 1986. The instant petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred by interpreting the waiver doctrine of Bankers Trust Co. v Mallis to destroy, rather than preserve, the within appeal.

II. Whether the Court of Appeals erred by determining the commencement of the appeal period as the date of improper entry of the Opinion and Order rather than the date of Appellant's act constituting a waiver of the separate document requirement.

III. Whether the Court of Appeals erred by dismissing the appeal from the District Court Opinion and Order affirming the Bankruptcy Court's Order of Abandonment, for lack of jurisdiction on grounds of untimely filing.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 54 (in pertinent part):

> (a) Definition: Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

Rule 58

> Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision

by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers in interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

Rule 79 (in pertinent part):

(a) Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. * * * * Papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. * * * *.

STATEMENT OF THE CASE

The within appeal arose out of the January 4, 1985 Claim of Appeal filed by Petitioner from an Order of the Bankruptcy

Court granting Respondent's Petition for Abandonment of the Accounts Receivable Fund of $23,920.17 in the Trustee's possession. On May 21, 1985, the District Court, Eastern District of Michigan (Honorable Stewart A. Newblatt), issued its Memorandum Opinion and Order affirming the Bankruptcy Court's Order of Abandonment. Appendix A. On June 5, 1985, Petitioner filed a Motion for Reconsideration. On June 28, 1985, the District Court issued its Memorandum Opinion and Order denying Petitioner's Motion for Reconsideration. Appendix B.

On July 25, 1985, Petitioner filed a Notice of Appeal to the United States Court of Appeals Sixth Circuit. On October 7, Petitioner filed its Brief on Appeal and on October 10, Respondent filed its Brief on Appeal. On November 12, 1985, Petitioner filed a Joint Appendix. On November 22, 1985, this Court, sua sponte, entered its Order Directing Petitioner to Show Cause why the appeal should not be dismissed for lack of jurisdiction for failure to file a timely Notice of Appeal. Appendix C. The Court of Appeals contended that the 30-day appeal period of the May 21, 1985 Order was not tolled because Petitioner's Motion for Reconsideration was not filed within ten (10) days of entry of this Order. Petitioner filed an Answer to the Court's Show Cause Order on December 10, 1985 pointing out that the District Court's Order of May 21, 1985 and June 28, 1985 were not set forth in a separate document as required by Rule 58. As these Orders were not set forth in separate documents, the appeal period did not commence running and, consequently, Petitioner's appeal was premature and not untimely.

The Court of Appeals cited the waiver doctrine of Bankers Trust Co. v Mallis to hold that Petitioner waived the requirement of a separate document entry and entered its Order dismissing the appeal on February 7, 1986. Appendix D. On February 19, Petitioner filed a Motion for Reconsideration, contending that the waiver doctrine of Bankers Trust Co.v Mallis is intended to preserve and not destroy an appeal. On March 25, 1986, the Court denied Petitioner's Motion for Reconsideration. Appendix E. Petitioner filed its Petition within ninety (90) days of the Sixth Circuit's Order denying Petitioner's Motion for Reconsideration.

REASONS FOR GRANTING WRIT

THE COURT OF APPEALS MISINTERPRETED THE WAIVER DOCTRINE OF BANKERS TRUST CO. V MALLIS, 435 U.S. 381 (1978) SO AS TO DESTROY RATHER THAN PRESERVE THE WITHIN APPEAL.

Rule 58, Federal Rules of Civil Procedure, provides that a judgment is effective only if set forth on a separate document and entered as provided in Rule 79(a). There is no dispute that the District Court Orders of May 21, 1985 and June 28, 1985 were included in the Memorandum Opinions and not set forth on separate documents as required by Rule 58.

In United States v Indrelunas, 411 U.S. 216, 93 S.Ct. 1562, 36 L.Ed. 2d 202 (1973), the Government, following entries by the District Court which did not comply with the "separate document" requirement, filed a Notice of Appeal, failed to pursue the appeal, moved for entry of a formal order and then filled a Notice of Appeal following entry of the formal order on a separate document. In reversing the Court of Appeals' decision that the Government's appeal was not timely filed, the Supreme Court held as follows:

> "The Court of Appeals appears to have been motivated in its conclusion, at least in part, by what it felt to have been the capricious conduct of the Government in first seeking to appeal following the filing of the stipulation for damages, and then later insisting that at that time there had been no judgment which it could have appealed from. But whatever may be the appropriate sanctions available in a particular case for capricious conduct on the part of a litigant, we do not believe that a case by case tailoring of the 'separate document' provision of Rule 58 is one of them. That provision is, as Professor Moore states, a 'mechanical change' that must be mechanically applied in order to avoid new uncertainties as to the date on which a judgment is entered." 411 U.S. 216, 221, 222, 93 S.Ct. 1562, 1565.

Following Indrelunas, the Sixth Circuit in a number of decisions held there was no jurisdiction over an appeal from a judgment which had not been entered on a separate document. Richland Trust Co. v Federal Insurance Co., 480 F.2d 1212

(6th Cir. 1973), Communication Workers of America v United Telephone Co. of Ohio, 491, F.2d 207 (6th Cir. 1974), Columbus Coated Fabrics v Industrial Commission of Ohio, 498 F.2d 408, (6th Cir. 1974), Huecker v Milburn, 538 F.2d 1241 (6th Cir. 1976). In these cases, the matters were remanded to the District Court for entry of judgment on separate documents. Following entry of judgment and the docketing of an appeal, the Court would hear and determine on the briefs and arguments previously submitted by the parties with the right to file supplemental memoranda or re-argue the case. Columbus Coated Fabrics, 498 F.2d 408, 409, Richland Trust Co., 48 F.2d 1212, 1214. It is readily evident that this procedure imposed additional and superfluous duties on both the litigants and the Court to arrive at the same posture of the matter.

In Bankers Trust Co. v Mallis, 435 U.S. 281, 387, 98 S.Ct. 1117, 1121, 55 L.Ed. 2d 357 (1978), the Court affirmed the exercise of appellate jurisdiction by a Court of Appeals where the District Court had not entered judgment on a separate document. The Court's rationale for this holding was:

> "The need for certainty as to the timeliness of an appeal, however, should not prevent the parties from waiving the separate judgment requirement where one has accidentally not been entered. As Professor Moore notes, if the only obstacle to appellate review is the failure of the District Court to set forth its judgment on a separate document, 'there would appear to be no point in obliging the appellant to undergo the formality of obtaining a formal judgment,' 9 J. Moore, Federal Practice (110.08 (2, p. 120 N. 7 1970). 'It must be remembered that the rule is designed to simplify and make certain the matter of appealability. It is not designed as a trap for the inexperienced. * * * * The rule should be interpreted to prevent loss of the right of appeal, not to facilitate loss."

In Mallis, the presumption is that appellant waived the "separate document" requirement to validate the appeal. The appellee who willingly participated in the appellate proceedings was obviously not misled or prejudiced. The waiver of the parties thus permitted the appeal to be determined on its merits, rather than being avoided on the basis of mere technicalties.

The Court of Appeals has focused, improperly, on the issue

of whether Petitioner was misled. The Supreme Court in Mallis was concerned with whether the appellee was misled or prejudiced, in recognition of the obvious fact that appellee can raise the "separate document" issue in the early stages of the appellate proceedings. The question to be resolved is whether Petitioner has waived the "separate document" requirement, and, if so, what activity of Petitioner's constituted a waiver.

Rule 58 imposes responsibility on the District Court for entry of judgments and orders. The proper entry of a judgment and order commences the running of the appeal period. The May 21, 1985 Order was not entered on a separate document as required by Rule 58 and, consequently, the appeal period did not commence to run. The Court of Appeals, however, held that the appeal period commenced to run on May 21, 1985 by virtue of waiver on the part of Petitioner. The question becomes, "What act of Petitioner constituted a waiver, thereby validating the invalid entry of May 21, 1985?"

Petitioner committed no act whatsoever between May 21, 1985 and June 4, 1985 and, consequently, there can be no waiver to validate the May 21, 1985 entry and permit the running of the appeal period. On June 5, 1985, Plaintiff filed its Motion for Reconsideration. If this is the act of waiver, the appeal period of necessity must commence to run as of this date. Furthermore, if the appeal period had not commenced to run between the dates of May 21, 1985 and June 4, 1985, it necessarily follows that Petitioner's Motion for Reconsideration on June 5, 1985 is not untimely.

Common sense dictates that Petitioner would not waive the "separate document" requirement as to the May 21, 1985 Order when such waiver would effectively destroy its right of appeal. It is respectively submitted that Mallis requires an interpretation of Rule 58 which preserves Petitioner's right of appeal. This interpretation precludes a finding of waiver on the part of Petitioner as to the "separate document" requirement of Rule 58 and a holding that the Court of Appeals lacks jurisdiction over the appeal for failure of the District Court to file its Orders of May 21, 1985 and June 28, 1985 on separate documents. This holding will permit Petitioner to move the District Court for proper entry of the Orders of May 21, 1985 and June 28, 1985 to commence the running of the appeal period thereby preserving this appeal.

CONCLUSION

For these reasons, a writ of centiorari should issue to review the Judgments and Opinions of the Sixth Circuit Court of Appeals.

Respectfully submitted,

June 20, 1986

MERRILL, TATHAM & ROSATI, P.C.

BY: _____

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Appendix A

Memorandum Opinion and Order of United States District Court, Eastern District of Michigan, Southern Division of May 21, 1985.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMOCO OIL COMPANY,

Appellant,

CIVIL ACTION
NO. 85-40015

v

HARMER OIL,

Appellee.

_____ /

MEMORANDUM OPINION AND ORDER

FACTS

On April 2, 1979, appellee Harmer Oil entered into a contract with debtor for the sale of certain assets. To secure debtor's performance, the parties entered into a security agreement in which the debtor granted Harmer a security interest in the above mentioned assets. During the pendency of the bankruptcy proceedings, the trustee collected $23,920.17 on accounts receivable resulting from the sale of debtor's inventory of petroleum products. Appellee Harmer petitioned the Bankruptcy Court for an order of abandonment as to the accounts receivable collected, claiming that funds were subject to the April 2 security agreement. On January 9, 1985, the Bankruptcy Court granted the petition, over the objections of appellant Amoco. On appeal, the Court must now review the Bankruptcy Court's decision.

ANALYSIS

The sole issue before the Court is whether the parties intended that Harmer Oil have a security interest in all of debtor's inventory of petroleum products, or only the inventory sold pursuant to the agreement to purchase assets. If the former is the case, the Bankruptcy Court's decision must be up-

held, since the $23,920.17 recovered by the trustee represents identifiable cash proceeds of the accounts receivable, which represent identifiable non-cash proceeds of the inventory. See MCLA §440. 9306(a) and (c). On the other hand, if the latter is true, appellee Harmer would only be entitled to that portion of the collected receivables which could be directly traced back to the inventory purchased by the debtor in 1979.*

Appellants argue that the parties intended that Harmer's security interest extend only to the inventory Harmer sold to debtor. In other words, Harmer was given a purchase money security interest in the assets it sold to debtor. See MCLA §440.9107(a). In support of this contention, Amoco cites to the preamble of the security agreement, which states:

> "Debtor has purchased various items of personal property, including a customer list, good will, inventory of petroleum products, 1975 Ford delivery truck, serial number C75EVW25079, 1972 Ford delivery truck, serial number C76EVL70672, and equipment pursuant to the provisions of a Purchase of Assets Agreement between the parties . . ."

Amoco then notes that section B, Grant of Security Interest states:

> the Debtor does grant to the Secured Party a security interest in all of the foregoing items of personal property which shall be a continuing security agreement and shall attach to such personal property as may from time to time be substituted as a replacement of any of the foregoing items of personal property.

If the security agreement stopped here, the Court would agree with Amoco. However, there is other language in the security agreement with indicates that the security interest in the inventory was a floating lien over all the debtor's inventory. See MCLA §440.9205. Section C, Paragraph 4 provides that the debtor shall . . .

---

*The parties agree that if traceable, Harmer is entitled to proceeds, since Section B of the Security Agreement extends Harmer's security interest to proceeds of the collateral.

> Not sell, exchange or dispose of any of the collateral without the permission of the Secured Party except that the Debtor shall be entitled to sell inventory items of motor fuels, petroleum products and heating fuels in the ordinary course of business; provided, further, that the Debtor shall maintain at all times a level of inventory products equal to the lesser of (a) the unpaid balance due under the Purchase of Assets Agreement to the Secured Party or (b) the level of inventory transferred by the Secured Party to the Debtor on the date of closing.

Moreover, Section D states:

> The Secured Party further acknowledges that the Debtor may, from time to time, create purchase money and security interests in favor of other vendors of inventory of petroleum products so long as the Debtor maintains unencumbered the minimum amount of inventory as set forth in Debtor's covenants, paragraph C, 4(a) and (b).

Clearly, these provisions reveal an intention on the part of the parties to grant Harmer a security interest in $26,204.91 worth of the debtor's overall inventory rather than in the specific inventory purchased by debtor.* Indeed, these provisions have no meaning if viewed in a context other than that of a floating lien. The Court must therefore conclude that the parties intended to treat the inventory different than the other collateral and that the Bankruptcy Court's characterization of Harmer's security interest as a floating lien covering all of the debtor's inventory was proper. Since the funds collected from the accounts receivable are traceable to the debtor's inventory and thus belong to Harmer, the Order of Abandonment was appropriate, as the estate has no interest in those funds.

*The value of the inventory purchased by debtor was $26,204.91.

CONCLUSION

For the reason set forth above, the Bankruptcy Court's January 9, 1985 Order of Abandonment is hereby AFFIRMED.

IT IS SO ORDERED.

STEWART A. NEWBLATT
United States District Judge

Appendix B

Memorandum Opinion and Order of United States District Court Eastern District of Michigan Southern Division of June 28, 1985

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION — FLINT

AMOCO OIL COMPANY,

Plaintiff, NO: 85-CV-40015-FL

v

HARMER OIL,

Defendant.

_____ /

MEMORANDUM OPINION AND ORDER

Before the Court is appellant's Motion for Reconsideration of its Memorandum Opinion and Order dated May 20, 1985. Inspired by appellant's horse hypothetical[1], the Court will set forth a hypothetical of its own which it believes adequately presents the issue which appellant has chosen to ignore. Walter Wealthy owns four race horses: Midnight Racer, Dawn Patrol, Black Night, and Bright Sun. After a long string of losses, Walter sells the animals to the Sticky Glue Company. One year later, Sticky Glue sells its processing plant, equipment, and inventory to Elmo Glue, Inc. which already owned one factory. To secure payment, Sticky Glue retained a security interest in the plant equipment and inventory.[2] The agreement provided:

---

[1] It should be noted that appellant's hypothetical is irrelevant to the facts of this case. This case involves the nature and scope of a security interest in inventory. Goods are inventory under the Code . . . if there are held by a person who holds them for sale or lease or to be furnished under contracts of service or if he has so furnished them, or if they are raw materials, work in process or materials used or consumed in a business. Inventory of a person is not to be classified as his equipment. MCLA §600.9101(4). Clearly, the four race horses in appellant's hypothetical are not inventory. On the other hand, the four barrels of glue in the Court's hypothetical are.

[2] At the time of the transfer, Stickey Glue's inventory consisted of four barrels of glue — you guessed it — Midnight Racer, Dawn Patrol, Black Night and Bright Sun.

The Debtor does grant to the Secured Party a security interest in all of the foregoing items of personal property which shall be a continuing security agreement and shall attach to such personal property as may from time to time be substituted as a replacement of any of the foregoing items of personal property.

It stated in Section 2 that the debtor may-

Not sell, exchange or dispose of any of the collateral without the permission of the Secured Party except that the Debtor shall be entitled to sell inventory items of glue products in the ordinary course of business; provided, further, that the Debtor shall maintain at all times a level of inventory products equal to the lesser of (a) the unpaid balance due under the Purchase of Assets Agreement to the Secured Party or (b) the level of inventory transferred by the Secured Party to the Debtor on the date of closing.

The Secured Party further acknowledges that the Debtor may, from time to time, create purchase money and security interests in favor of other vendors of inventory of glue products so long as the Debtor maintains unencumbered the minimum amount of inventory as set forth above.

After a few years of operation, Elmo Glue filed bankruptcy. At the time of the filing, Elmo's entire inventory consisted of two barrels of glue. The question which the Court must again ask is how can Sticky's security interest be limited to the four barrels of glue originally transferred to Elmo if Section of the security agreement is to be given any meaning? The Court does not believe it can. The appellant, for all its protestation as to the clarity and unambiguity of the security agreement, has offered no means of doing so. Therefore the Court still believes that, in order to give some meaning to Section c, paragraph 4 of the security agreement in this case (Section 2 of the hypothetical) it must conclude that the parties intended Harmer's security interest in the amount of $26,204.91 to extend to all the debtor's inventory.

CONCLUSIONS

For the reasons set forth above, appellant's Motion for Reconsideration is hereby DENIED.

IT IS SO ORDERED.

Dated: 6/28/85

STEWART A. NEWBLATT
United States District Judge

Appendix C

Show Cause Order of United States Court of Appeals, Sixth Circuit of November 22, 1985.

No. 85-1619

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMOCO OIL COMPANY,
Plaintiff-Appellant,

v.

JIM HEILIG OIL & GAS, INC. ET AL.,
Defendants-Appellees.

ORDER

Appellant is appealing from the district court order affirming the Bankruptcy Court's order of abandonment.

It appears from the record that the Memorandum Opinion and Order was entered May 21, 1985 and that the notice of appeal was filed on July 25, 1985. This filing occurred 35 days late. Rule 4(a) and 26(a), Federal Rules of Appellate Procedure.

It further appears from the record that appellant did not apply to the District Court for an extension of time within which to file his notice of appeal late, due to excusable neglect, and it appears that no such extension has been granted by the District Court.

It is therefore ORDERED that appellant show cause in writing not later than 21 days from the file date of this order why the appeal should not be dismissed for lack of jurisdiction.

It is further ORDERED that the briefing schedule be held in abeyance pending resultion of the question of jurisdiction.

ENTERED BY ORDER OF THE COURT

Clerk

Appendix D

Order dismissing appeal of the United States Court of Appeals, Sixth Circuit of February 7, 1986.

No. 85-1619

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMOCO OIL CO.,
Plaintiff-Appellant,

v.

JIM HEILIG OIL & GAS, INC.
HARMER OIL.,
Defendants-Appellees.

ORDER

BEFORE: KEITH, MARTIN and KRUPANSKY, Circuit Judges

This matter is before the Court upon consideration of the appellant's response to this Court's show cause order.

It appears from the record that the decision was entered May 21, 1985. The notice of appeal filed on July 25, 1985 was 35 days late. Rule 4(a) and 26(a), Federal Rules of Appellate Procedure.

Appellant's response to this Court's show cause order alleges that instead of the appeal being filed late that it was prematurely filed since no separate judgment as required by Rule 58, Federal Rules of Civil Procedure, has ben entered. The purpose of a separate judgment is merely to identify the district court order as a final decision and clarify when the appeals period began to run. Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978). Mallis applied a common-sense application of Rule 58 rather than a technical application as long as no parties were misled. Falls Stamping & Welding v. International Union, UAW, 744 F.2d 521, 526 (6th Cir. 1984). A review of the record indicates that the appellant was not misled by the failure to enter a separate judgment. Counsel for appellant recognized the district court's May 21, 1985 memorandum opinion as the final decision and sought reconsideration of the court's decision. The mere technicality that the district court failed to file a

separate judgment should not be used to give jurisdiction to this Court of an untimely filed appeal in which the parties were not misled by the lack of a separate judgment.

The failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction. Compliance with Rule 4(a), Federal Rules of Appellate Procedure, is a mandatory and jurisdictional prerequisite which this Court can neither waive nor extend. Peake v. First Nat. Bank and Trust Co. of Marquette, 717 F.2d 1013 (6th Cir. 1983). Rule 26(b), Federal Rules of Appellate Procedure, specifically provides that this Court cannot enlarge the time for filing a notice of appeal.

Accordingly, it is ORDERED that the appeal be and it hereby is dismissed for lack of jurisdiction. Rule 9(d)(1), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

_____

Clerk

ISSUED AS MANDATE: April 2, 1986

COSTS: NONE

Appendix E

Order denying Motion for Reconsideration of United States Court of Appeals, Sixth Circuit, of March 25, 1986

No. 85-1619

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMOCO OIL CO., Plaintiff-Appellant,	)	
v.	)	ORDER
JIM HEILIG OIL & GAS, INC. HARMER OIL, Defendants-Appellees.	)	

BEFORE: KEITH, MARTIN and KRUPANSKY, Circuit Judges.

This matter was before the Court upon consideration of appellant's motion for reconsideration of this Court's February 7, 1986 order, dismissing the appeal for lack of jurisdiction.

This Court having carefully re-examined the record, finds it misapprehended no questions of law or fact in its February 7, 1986, decision. It is evident from the record that the district court and the parties understood the May 21, 1985, district court opinion and order to constitute the final judgment of the district court and, therefore, no separate judgment was required. Peake v. First National Bank and Trust Co. of Marquette, 717 F.2d 1016, 1019-20 (6th Cir. 1983).

It is ORDERED that the motion for reconsideration be and hereby is denied.

ENTERED BY ORDER OF THE COURT

Clerk

Supreme Court, U.S.
FILED
OCT 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2107

In The
Supreme Court of the United States
October Term, 1986

AMOCO OIL CO,

Petitioner,

v

JIM HEILIG OIL & GAS, INC; HARMER OIL,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the separate judgment requirement of Federal Rule of Civil Procedure 58 was waived by the parties in treating the Opinion and Order of the District Court as the final Judgment for all purposes on appeal.

II. Whether Petitioner can rely on the separate Judgment requirement to excuse its erroneous assumption that a Motion to Reconsider tolls the time limits for filing a Notice of Appeal to the Circuit Court.

DISCLOSURE OF CORPORATE AFFILIATIONS

Pursuant to Sup. Ct. R. 28.1, Respondent Harmer Oil, Inc. makes the following disclosure:

Respondent, Harmer Oil, Inc. was a Michigan Corporation and wholly owned by Jack T. Harmer. It had no subsidiaries or affiliates, and has been dissolved with all assets transferred to Mr. Harmer.

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& LINDHOLM
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FEDERAL PROCEDURAL RULES INVOLVED

Federal Rules of Civil Procedure, Rule 58

> Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

Federal Bankruptcy Rules, Rule 8015

> Unless the district court of the bankruptcy appellate panel by local rule or by court order otherwise provides, a motion for rehearing may be filed within 10 days after entry of a judgment of the district court or the bankruptcy appellate panel.

Federal Rules of Appellate Procedure, Rule 4(a)(1)

> In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer

or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

COUNTER-STATEMENT OF THE CASE

Petitioner's statement of the case is in error to the extent it states the Court of Appeals contended the Motion for Reconsideration did not toll the appeal period as not filed within 10 days of the May 21, 1985 Order. Neither in the Order to Show cause nor in any other pleadings did the Circuit Court make that claim. The record does not reflect why the Circuit Court held the Motion to Reconsider did not toll the appeals period, but Petitioner has not challenged the Circuit Court's position that no tolling occurred.

No. 85-2107

In The
Supreme Court of the United States
October Term, 1986

AMOCO OIL CO,

Petitioner,

v

JIM HEILIG OIL & GAS, INC; HARMER OIL,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUMMARY OF ARGUMENT

Petitioner considered the May 21, 1985, Order of the District Court as the final Judgment for purposes of appeal and as commencing the 30 day appeals period. It either deliberately disregarded or was completely unconcerned with the separate Judgment requirements of Rule 58 and was willing to, and did proceed with the appeal as if Rule 58 was satisfied or did not apply. If the appeal had been timely

filed the provisions of Rule 58 would, therefore, have been considered waived, and the Circuit Court would have decided the merits of the case. However, due to Petitioner's misunderstanding of the effect of a Motion to Reconsider on the 30 day filing period, its appeal was untimely. Petitioner now argues that it did not intend to waive the requirements of Rule 58, and by reliance thereof can avoid the results of its own ignorance. However, the requirement of a separate Judgment can be and has been waived in this case, and is not available as an excuse for Petitioner's untimely appeal.

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ARGUMENT

Federal Rule of Appellate Procedure 4(a)(1) provides that a Claim of Appeal must be filed within 30 days from the date of entry of the Judgment or Order appealed from, and Rule 58 of the Federal Rules of Civil Procedure provides that a Judgment shall be set forth on a separate document. It is undisputed that no separate "Judgment" was ever entered by the District Court after ruling on the appeal from the Bankruptcy Court. However, Petitioner considered the May 21, 1985 Memorandum Opinion and Order of the District Court as the final Judgment for purposes of appeal and as commencing the 30 day appeal period. This is clearly shown by the July 24, 1985 Notice of Appeal, wherein Petitioner expressly claimed an appeal from that Order. At no time before the Sixth Circuit, or in its Petition for Writ of Certiorari has Petitioner made any claim that it misunderstood the time requirements for filing an appeal because of the lack of entry of a formal Judgment.

Petitioner's error, however, was its mistaken belief that a Motion for Reconsideration, if filed within the 30 day appeals period, would toll the time for filing an appeal until that Motion was decided. However, the Sixth Circuit has ruled that even if a Motion for Reconsideration could toll the time for filing an appeal it must be filed within 10 days to do so. *Peake v First Nat'l Bank & Trust Co of Marquette,* 717 F2d 1016 (6th Cir 1983). Further, Rule 8015 of the Federal Rules of Bankruptcy Procedure, which controls as this case originated in Bankruptcy Court, also has a 10 day limitation on filing a Motion for Rehearing of an appeal of a bankruptcy judge's decision to the District Court. The Advisory Committee Note to that Rule expressly states that

> "The filing of a motion for rehearing does not toll the time for taking an appeal to the court of appeals from the district court or the bankruptcy appellate panel."

Therefore, whether considered as an ordinary case originating in district court, or as a bankruptcy appeal, the result is still the same, the Motion for Reconsideration did not toll or otherwise extend the time for appeal to the Circuit Court. When this came to the attention of the Sixth Circuit it issued an Order to Show Cause why the appeal should not be dismissed. In response Petitioner for the first time claimed that no separate Judgment had been entered, and therefore, the appeal was not untimely, but rather premature. Respondent submits that Petitioner cannot rely on this defense to excuse its own clear error, and having previously decided to treat the District Court's Order as a final Judgment for all purposes on appeal must abide by the results of that decision.

In *Banker's Trust Co v Samuel Mallis,* 435 US 381, 98 S Ct 1117, 55 L Ed 2d 357 (1978), this Court held that the

filing of a separate and distinct Judgment under Rule 58 of the Federal Rule of Civil Procedure is not a prerequisite for jurisdiction in the Court of Appeals. The Court stated that the separate document requirement was intended

> "to avoid the inequities that were inherent when a party appealed from a document or docket entry that appeared to be a final judgment of the district court only to have the appellate court announce later that an early document or entry had been the judgment and dismissed the appeal as untimely. 435 US at 385.

Further, the Court stated that a common sense application of Rule 58 should be applied, and the technical requirements for a Notice of Appeal were not mandatory if this did not mislead or prejudice any party. *Bankers Trust Co v Mallis, supra,* 435 US at 387.

In this case the appeal was not dismissed because Petitioner was unaware that a prior Order was the final Judgment of the District Court. Further, Petitioner was not misled, or prejudiced by the failure of the Court to enter a separate Judgment. Rule 58, therefore, did not cause, and had nothing to do with the dismissal of the appeal, except as a belated attempt by Petitioner to escape the results of its own negligence.

Petitioner has argued that it did not "waive" the requirements of Rule 58. However, the basis for that claim appears to be Petitioner's ignorance. Until forced to find some answer to the Order to Show Cause Petitioner apparently was unaware of the provisions of that Rule or of the District Court's noncompliance therewith. Yet, knowledge is not required for this waiver. If one is aware that a separate Rule 58 Judgment has not been entered

he will see to its entry rather than risk having his appeal challenged and dismissed as premature. It is only where one is unaware that the requirements of Rule 58 have not been satisfied that one would appeal before a judgment is entered.

Moreover, Petitioner's own actions belies its argument that no waiver was made. Either with knowledge of, or total disregard for the absence of a Rule 58 Judgment, it filed an appeal, briefed the same, and would have had the Circuit Court decide the merits of the case. That action, if timely done, would have constituted a waiver of the separate Judgment requirement and if Petitioner's appeal had been challenged as premature it undoubtedly would have argued that it had "intended" to waive any procedural impediment to commencement of the appeals period. There is no reason in law or equity why a waiver should be found in that case but cannot be found here. In *Bankers Trust Co v Mallis*, supra, a waiver was found from the actions of the parties in treating the District Court's Order as if it were a separate final Judgment for purposes of appeal, and those same circumstances exist in this case.

In summary, Petitioner's appeal was untimely filed because of its assumption that a Motion for Reconsideration tolled the appeals period. In an attempt to escape the results of its failure to examine the Rules and case laws on this issue, Petitioner tried to hide behind the requirements of Rule 58, which it had implicitly waived and completely ignored until that time. However, all parties, including Petitioner, having treated the May 21, 1985 Order as the final Judgment of the Court for purposes of

appeal, the requirements of Rule 58 were waived, and Petitioner cannot rely thereon as justification for its own negligence.

CONCLUSION

WHEREFORE, on the basis of the foregoing, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

AMOCO OIL CO. *v.* JIM HEILING OIL & GAS, INC. AND HARMER OIL

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 85–2107. Decided November 17, 1986

The petition for a writ of certiorari is denied.

JUSTICE BLACKMUN, with whom JUSTICE O'CONNOR joins, dissenting.

This case concerns an application of the "separate document" requirement for judgments contained in Rule 58 of the Federal Rules of Civil Procedure.[1] I dissent from the denial of certiorari because I am persuaded that the United States Court of Appeals for the Sixth Circuit misconstrued our prior cases having to do with the requirement.

Petitioner Amoco Oil Co. took an appeal from an order issued by the Bankruptcy Court for the Eastern District of Michigan. On May 21, 1985, the District Court affirmed the Bankruptcy Court's ruling by a memorandum and order consisting of a single document. Petitioner moved for reconsideration. The motion was denied on June 28 in a similar single-document memorandum and order.[2]

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[1] Rule 58 reads in its entirety:

"Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. *Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered* as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course." (Emphasis supplied.)

[2] Inasmuch as the motion for recon[illegible]ation was untimely, it is not clear why the District Court entertai[illegible]. See Fed. Rule Civ. Proc. 59(e). In any event, because of its untimeliness, the motion would not

On July 25, 1985, Amoco filed a notice of appeal with the Court of Appeals for the Sixth Circuit. That court issued an order directing Amoco to show cause why the appeal should not be dismissed. It suggested that, because the District Court had issued its initial memorandum opinion and order on May 21, Amoco's filing would be 35 days late under Federal Rules of Appellate Procedure 4(a) and 26(a). App. to Pet. for Cert. C–1. In response, Amoco contended that, rather than being untimely, its appeal actually was premature, given that the District Court had never entered a judgment separate from the May 21 memorandum and order as Rule 58 requires. The Court of Appeals rejected this contention. It observed that in *Bankers Trust Co.* v. *Mallis*, 435 U. S. 381 (1978) (*per curiam*), this Court had adopted a common-sense, rather than a technical, approach to the requirements of Rule 58 so long as no party was misled. App. to Pet. for Cert. D–1. The Court of Appeals further noted that Amoco's motion for reconsideration of the May 21 memorandum and order demonstrated that Amoco considered that opinion to be the final decision. Accordingly, the court concluded, "The mere technicality that the district court failed to file a separate judgment should not be used to give jurisdiction to this Court of an untimely filed appeal in which the parties were not misled by the lack of a separate judgment." App. to Pet. for Cert. D–1 to D–2.

Rule 58 provides in pertinent part: "Every judgment shall be set forth on a separate document." See n. 1, *supra*. The genesis and purpose of this "separate document" requirement, which was added to Rule 58 by amendment in 1963, are explained in the Advisory Committee Notes. Prior to the amendment difficulties had arisen in situations where a court had "written an opinion or memorandum containing some apparently directive or dispositive words, *e. g.*, 'the plaintiff's motion [for summary judgment] is granted.'" 28 U. S. C. App., p. 627. At times court clerks had viewed these documents as a sufficient basis for entering a judgment. Problems occasionally arose, however, when the documents did not provide all the necessary elements of the judgment or when the court later would issue a formal judgment. Parties were thus uncertain as to when the judgment was effective and as to when the time began to

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have tolled the time for Amoco's appeal had there been no Rule 58 problem with the District Court's original memorandum opinion and order. See Fed. Rule App. Proc. 4(a)(4).

run for purposes of filing post-judgment motions and appeals. The Advisory Committee observed: "The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document—distinct from any opinion or memorandum—which provides the basis for the entry of judgment." *Id.*, at 628.

This Court already has been concerned with the interpretation of Rule 58. In *United States* v. *Indrelunas*, 411 U. S. 216 (1973) (*per curiam*), it was faced with a situation where, although a docket entry had been made on March 21, 1969, which noted jury verdicts in favor of respondent and another against the Government, the formal judgment specifying the amount of the verdicts was not entered until February 25, 1971. The Court of Appeals for the Seventh Circuit dismissed the Government's appeal, filed after the 1971 entry, as untimely. This Court reviewed the history of the 1963 amendment to Rule 58 and cited with approval Professor Moore's remark that the rule constituted "'a mechanical change that would be subject to criticism for its formalism were it not for the fact that something like this was needed to make certain when a judgment becomes effective.'" *Id.*, at 220 (quoting 6A J. Moore, Federal Practice § 58.04[4.–2], p. 58–161 (1972)). It also concluded that the appeal taken and abandoned by the Government during the time between the docketing of the jury verdict and the entry of judgment was not an appropriate part of the Rule 58 inquiry. It noted simply that "whatever may be the appropriate sanctions available in a particular case for capricious conduct on the part of a litigant, we do not believe that a case-by-case tailoring of the 'separate document' provision of Rule 58 is one of them." 411 U. S., at 221. Accordingly, it concluded that the mechanical application of Rule 58, as advocated by Professor Moore, was appropriate and required reversal of the Court of Appeals' judgment.

In *Bankers Trust*, *supra*, the Court returned to the separate-document matter. There the Court of Appeals for the Second Circuit had proceeded to a consideration of the merits of an appeal even though it could find no document appearing to be a judgment of the District Court. See 435 U. S., at 382. The Court of Appeals based its decision on the fact that the District Court and the parties assumed that the dismissal had been adjudicated. *Ibid.* We approved that conclusion. We first observed that the major purpose behind the separate-document requirement was to clarify when the time for an appeal begins to run. Citing the remarks of the Advisory Committee mentioned above, we further noted that

the separate-document requirement was aimed particularly at "avoid[ing] the inequities that were inherent when a party appealed from a document or docket entry that appeared to be a final judgment of the district court only to have the appellate court announce later that an earlier document or entry had been the judgment and dismiss the appeal as untimely." *Id.*, at 385. We could not see, however, how the purpose of Rule 58 or the concerns of the Advisory Committee would be served in that case by depriving the Court of Appeals of jurisdiction because of the absence of a separate document. If the court were to lose jurisdiction for this reason, then "[u]pon dismissal, the district court would simply file and enter the separate judgment, from which a timely appeal would then be taken. Wheels would spin for no practical purpose." *Ibid.* While observing that "[t]echnical application" of Rule 58 would be necessary in a situation similar to the one in *Indrelunas* to avoid a party's uncertainty as to when to bring an appeal, we concluded that the rule "should not prevent the parties from waiving the separate-judgment requirement where one has accidentally not been entered." *Id.*, at 386. In this respect, we cited another remark of Professor Moore: "'[I]t must be remembered that the rule is designed to simplify and make certain the matter of appealability. It is not designed as a trap for the inexperienced. . . . The rule should be interpreted to prevent loss of the right of appeal, not to facilitate loss.'" *Ibid.* (quoting 9 J. Moore, Federal Practice ¶ 110.08[2], pp. 119–120 (1970)).

These two decisions, I believe, are to be read to support the following proposition: the separate-document requirement must be applied mechanically in order to *protect* a party's right of appeal, although parties may waive this requirement in order to maintain appellate jurisdiction of their case. Cf. 6A J. Moore, J. Lucas, & G. Grotheer, Moore's Federal Practice ¶ 58.02.1, p. 58–22 (1986). The fundamental error of the Court of Appeals in this case, therefore, was to employ Amoco's purported waiver to *defeat* its appeal. Amoco's filing for reconsideration might well have signaled its recognition that the May 21 order was indeed the final judgment. As the Court made clear in *Indrelunas*, however, while relevant to the question of sanctions, a party's conduct is irrelevant to the application of Rule 58 unless it serves to *maintain* the right of appeal. Given that a finding of waiver in this case results in Amoco's loss of its right of appeal, then, under our earlier decisions in *Indrelunas* and *Bankers Trust*, Rule 58 should have been applied mechanically.

The Court of Appeals should have dismissed the purported appeal and directed the District Court to enter a final judgment, from which a proper appeal could lie. Accordingly, I would grant certiorari and reverse the judgment of the Court of Appeals.